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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/763,058	04/27/2001	Isabelle Bara	05725.0857	1997
7590 12/17/2003 Finnegan Henderson Farabow Garrett & Dunner 1300 I Street N W Washington, DC 20005-3315			EXAMINER GOLLAMUDI, SHARMILA S	
			ART UNIT 1616	PAPER NUMBER

DATE MAILED: 12/17/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action</b>	<b>Application No.</b> 09/763,058	<b>Applicant(s)</b> BARA ET AL.	
	<b>Examiner</b> Sharmila S. Gollamudi	<b>Art Unit</b> 1616	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 12 November 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: \_\_\_\_\_.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8. ☐ The drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

Applicant argues that the finality of the office action is premature since applicant's amendment reciting "present in a concentration of less than 20% by weight" is encompassed by the dependent claim recitation of "ranging up to 20%."

Applicant's arguments have been fully considered but they are not persuasive. The examiner points that the recitation does not include 20% since the agent must be present in the amount of less than 20% whereas the recitation of "ranging up to 20%" includes 20%. Therefore, the prior search conducted by Examiner Dewitty and subsequent office action generated was concerning a different range than one conducted by the present examiner. It should be noted that the art cited by the previous examiner, Roulier et al US patent 6,045,814, recited the gelling agent in the amount of 20-80%. Clearly a new rejection needed to be formulated to provide a motivation to utilize less than 20%. Therefore, finality is maintained.

Applicant argues that Avelle's composition does not inherently possess the instant hardness and that Avelle's examples have indefinite components.

Applicant's arguments have been fully considered but they are not persuasive. First the examiner points out that the critical features and amounts claimed in the rejected claims and that of the prior art are the same; therefore the instant claims do not distinguish over the prior art since applicant has not included the amount of ingredient that would cause the instant hardness. Secondly the burden is shifted to the applicant to prove that the prior art does not have the instant hardness and applicant has not provided evidence of such. In regards to the infinite components of Avelle, the examiner points out that the instant independent claim is not specific in components either.

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Furthermore, as stated in the final office action Avelle teaches some of the instant components, for example Avelle teaches the specific "components" recited in dependent claims 33, 46, 47, etc. Lastly, the examiner points out that both the instant application and prior art have the same application such as make-up sticks, etc that may be applied to the face. The examiner points to the following passage in Avelle:

These gels have the disadvantage of being in a liquid, semiliquid or pasty form so that it is indispensable for them to be include permanently in a container for confining and containing them, while their use in the form of a stick is substantially prevented.

The object of the present invention has been that of providing a gel containing water, that exhibits particular features of solidity and compactness, so that it can be applied directly to the skin or taken with the fingers or with a special applicator, in any case without its form having to be compulsorily confine by a container during the application step.

Therefore, if, for arguendo sake, Avelle does not inherently teach the instant hardness, then one would want to modify the hardness depending on the product and its use as taught by EP wherein the composition can be applied as a stick or in an applicator.

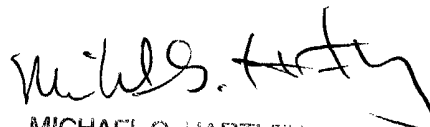
Applicant argues that Roulier et al do not teach the instant range and there is no motivation to decrease the amount of the gelling agent. Further, the applicant argues of unexpected results.

Applicant's arguments have been fully considered but they are not persuasive. The examiner points out that 20 and less than 20; i.e. 19.55 or 19.99% is an obvious modification since applicant's claimed range clearly encompasses 19.99%. A minor change in a claimed range does not distinguish over the prior art. In regards to the unexpectedness of the instant invention, the examiner points out that the applicant has

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not provided any results or a Rule 132 Declaration. Furthermore, Miyajima provides motivation to decrease the amount of the gelling agent. See office action dated July 2003. In regards to applicant's argument that Miyajima teaches different substituents than common polysaccharides, the examiner points out that the scope of instant claims do not exclude the substituents of Miyajima's polysaccharides.

The rejections are maintained for the reasons discussed above and for the reasons set forth in the office action dated July 2003.



MICHAEL G. HARTLEY  
PRIMARY EXAMINER